No. 75-1349

In the Supreme Court of the United States

OCTOBER TERM, 1975

PAUL CLYDE VILLANO AND PAULINE SMALDONE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-26) is reported at 529 F.2d 1046.

JURISDICTION

The judgments of the court of appeals (Pet. App. A-27 to A-30) were entered on January 8, 1976, and a petition for rehearing with suggestion of rehearing *en banc* was denied on February 17, 1976 (Pet. App. A-31 to A-32). The petition for a writ of certiorari was filed on March 18, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to prove violations of the Travel Act, 18 U.S.C. 1952.

2. Whether the government's evidence was tainted by allegedly illegal electronic surveillance, and whether the district court properly refused to allow petitioners to inspect internal communications of the F.B.I. purportedly relevant to this claim.

3. Whether the district court properly admitted voice identification testimony.

4. Whether petitioners were denied a fair trial by pretrial publicity.

5. Whether petitioners' federal prosecution, which followed their state trial for gambling offenses, violated the Double Jeopardy Clause of the Fifth Amendment.

STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioners were convicted of three counts of using a facility in interstate commerce (a telephone) with intent to conduct an illegal gambling enterprise, in violation of 18 U.S.C. 1952 and 2. Petitioner Villano was sentenced to a concurrent term of imprisonment for one year and one day on each count and was fined $2,250. The imposition of petitioner Smaldone's sentence was suspended, and she was placed on two years' probation and fined $2,250. The court of appeals affirmed (Pet. App. A-1 to A-26).

The evidence at trial, which is set forth in detail in the opinion of the court of appeals (Pet. App. A-2 to A-5), showed that petitioners assisted in managing a bookmaking business in Denver, Colorado. Petitioner Villano handled substantial betting on football and basketball games with Denver residents, who testified that he personally was in charge of collections and payoffs (R VI 330, 332-334, 347-348, 350-354).

From November 1970 through February 1971, Frank Amato worked as a telephone operator for a Denver

bookmaker, taking wagers totalling between $5,000 and $7,000 per day and providing line information. Upon receipt of the bets, Amato relayed them to a woman whose voice he identified as that of petitioner Smaldone. Amato specifically recalled receiving telephone calls from a bettor who referred to himself as "X-15," who was identified at trial as Fud Ferris (R V 102, 142-145, 147, 149, 150-151). In January 1971, Amato was arrested by Colorado state authorities for gambling violations; his bond was provided at the request and expense of petitioner Villano (R V 148; R VI 302-303).

Richard Colgan was employed by petitioner Villano as a telephone operator and was paid in cash by Villano on a weekly basis. Colgan testified that he serviced approximately 50 customers and received an average of $25,000 to $35,000 in bets per week. After receiving bets Colgan relayed them to a woman known to him as Pauline, who received this information at a telephone listed to "C. M. Smaldone" at a residence owned by petitioner Smaldone (R V 154-155, 160-161; Gov't. Exs. 4-7). If the sports schedules required by Colgan were late, he would call petitioner Smaldone's number and the schedules would be sent to him. If a bettor desired to exceed the $2,000 limit on any single bet, Colgan also would call petitioner Smaldone and the decision to accept or reject the large wager would be made by petitioner Villano (R V 161-162).

The evidence of interstate telephone calls came from Fud Ferris, a resident of Valentine, Nebraska. He testified that during late 1970 and early 1971 he placed bets with a Denver bookmaker, using telephone facilities located in Valentine and North Platte, Nebraska. Ferris stated that he had three Denver telephone numbers that he would call and that he used code number X-15 when placing all of his bets (R V 99, 100-102). Ferris also testified

that he was paid his winnings in Denver by a man known to him as "Paulie" (R V 104, 108), which was petitioner Villano's nickname (R V 179, 186, 192; R VI 365).[1] The time and place of each payment were previously arranged during Ferris's interstate telephone calls to Denver when he obtained line information and placed bets (R V 100-105).

Several of the telephone calls made by Ferris were corroborated by telephone company records. The records, together with the testimony of Ferris, Amato, and Colgan, showed that there had been at least 16 interstate telephone calls to numbers operated by Amato and Colgan during the indictment period (Pet. App. A-5, n. 4).

ARGUMENT

1. Petitioners claim (Pet. 12-20) that the evidence was insufficient to establish violations of the Travel Act, 18 U.S.C. 1952.

a. Petitioners' initial contention is that the government failed to connect them with what they characterize as "the Amato or Colgan operations" (Pet. 12). As the court of appeals correctly concluded (Pet. App. A-6), however, there was abundant evidence (see *supra*, pp. 2-3) from which the jury could have concluded beyond a reasonable doubt that petitioners supervised or at least aided and abetted Amato and Colgan in carrying on the unlawful activity alleged in the indictment.

b. Relying on *Rewis* v. *United States*, 401 U.S. 808, petitioners next contend that the interstate contacts of their operation were too minimal or incidental to violate

[1]Ferris could not positively identify petitioner Villano at trial as the person who had paid him on these occasions (R V 104).

the Travel Act. In *Rewis*, this Court reversed the convictions of two operators of a lottery in Florida that had occasionally been patronized by unsolicited bettors from nearby Georgia. But the present case is distinguishable from *Rewis* for two reasons. First, unlike *Rewis*, where only the customers of the lottery used interstate facilities, here petitioners, through their agents, utilized the telephone in interstate commerce as an integral part of their illegal gambling operation. See *United States* v. *Sellaro*, 514 F. 2d 114, 120 (C.A. 8), certiorari denied, 421 U.S. 1013. Indeed, *Rewis* cited with approval "cases in which federal courts have correctly applied §1952 to those individuals whose agents or employees cross state lines in furtherance of illegal activity." 401 U.S. at 813.

Second, the interstate contacts in this case were neither infrequent nor incidental to the enterprise. On the contrary, Ferris had been supplied with a code number to conceal his identity and had used this code number to make numerous interstate calls for the exclusive purposes of securing line information, placing bets, and arranging occasional payoffs in Colorado. The court of appeals correctly observed (Pet. App. A-10) that although Ferris's calls were a "relatively small part of the gambling business handled by Colgan and Amato[,] * * * there was repeated use of interstate communications which produced a substantial volume of gambling." See, *e.g.*, *United States* v. *Eisner*, C.A. 6, No. 75-1908, decided April 14, 1976; *United States* v. *John*, 508 F. 2d 1134 (C.A. 8), certiorari denied, 421 U.S. 962; *United States* v. *LeFaivre*, 507 F.2d 1288 (C.A. 4), certiorari denied, 420 U.S. 1004.[2] Accordingly, the

[2]There is no conflict between the decision below and the interpretation of Section 1952 by the Seventh Circuit in *United*

evidence was sufficient to establish violations of the Travel Act. See *Erlenbaugh* v. *United States*, 409 U.S. 239, 247, n. 21.

c. Finally, petitioners urge that the evidence failed to establish that they knew of the interstate character of their gambling operation and that the trial court erred by instructing the jury that such knowledge did not have to be proven (see R VII 466-467). It is well-settled, however, that a conviction under Section 1952 does not require proof of a defendant's personal knowledge of the interstate nexus. See *United States* v. *Peskin*, 527 F. 2d 71, 78 (C.A. 7), petition for a writ of certiorari pending on other issues, No. 75-1514; *United States* v. *LeFaivre*, *supra*, 507 F. 2d at 1297; *United States* v. *Doolittle*, 507 F. 2d 1368, 1372 (C.A. 5), affirmed *en banc*, 518 F.2d 500, petitions for writs of certiorari pending on other issues, Nos. 75-500, 75-509, 75-513; *United States* v. *Colacurcio*, 499 F.2d 1401, 1405-1406 (C.A. 9); *United States* v. *Hanon*, 428 F. 2d 101, 108 (C.A. 8) (*en banc*), certiorari denied, 402 U.S. 952; see also *United States* v. *Altobella*, 442 F. 2d 310 (C.A. 7), and *United States* v. *McCormick*, 442 F.2d 316 (C.A. 7). In *Altobella*, the only interstate nexus was a single $100 check which was mailed between Illinois and Pennsylvania by the victim of an extortion scheme. In *McCormick*, the defendant had placed an advertisement in a local newspaper, a few copies of which were mailed to the paper's out-of-state subscribers. Thus, both cases involved wholly incidental interstate activity, caused by persons other than the defendants. The absence of a conflict is further illustrated by recent decisions of the Seventh Circuit that have refused to apply *Altobella* or *McCormick* to interstate activity that was engaged in by the defendant or his agent or was essential to the operation of the criminal enterprise. See *United States* v. *Peskin*, 527 F.2d 71 (C.A. 7); *United States* v. *Rauhoff*, 525 F.2d 1170 (C.A. 7).

States v. *Smaldone*, 485 F. 2d 1333, 1348-1349 and n. 10 (C.A. 10), certiorari denied, 416 U.S. 936.[3]

This conclusion is reinforced by the decision in *United States* v. *Feola*, 420 U.S. 671. In *Feola*, the Court held that a conviction under 18 U.S.C. 111, which prohibits assaults upon federal officers, does not require that the defendant be aware of his victim's official status, primarily because the federal element is only jurisdictional, but also because the contrary view would contravene the plain language of the statute and would frustrate the intent of Congress in enacting it. As the Ninth Circuit explained in *United States* v. *Roselli*, 432 F. 2d 879, 890-891, certiorari denied, 401 U.S. 924, quoting from *United States* v. *Blassingame*, 427 F. 2d 329, 330 (C.A. 2), the same rationale is applicable here:

> The statute does not condition guilt upon knowledge that interstate communication is used. The use of interstate communication is logically no part of the crime itself. It is included in the statute merely as a ground for federal jurisdiction. The essence of the

[3]Petitioner cites *United States* v. *Honeycutt*, 311 F. 2d 660 (C.A. 4), and *United States* v. *Barnes*, 383 F.2d 287 (C.A. 6), in support of his contention. But *Honeycutt* merely reversed a conviction under Section 1952 because the evidence of the crime was insufficient, not because the defendant had been unaware of the interstate nexus. Indeed, the Fourth Circuit has emphatically endorsed the view that no such knowledge is required. *United States* v. *LeFaivre*, *supra*. The Sixth Circuit therefore stands alone in holding that knowledge of interstate activity must be shown. *United States* v. *Barnes*, 383 F. 2d 287, certiorari denied, 389 U.S. 1040; *United States* v. *Prince*, 529 F. 2d 1108. Even that court, however, does not require proof of a defendant's *actual* knowledge. It is sufficient if a person charged under Section 1952 has reason to know of the use of an interstate facility. See *United States* v. *Eisner*, *supra*. Under the circumstances, we believe that it is unnecessary for the Court to resolve this apparent conflict between the Sixth Circuit and the other courts of appeals at this time.

crime is the [illegal] scheme itself. Nothing is added to the guilt of the violator of the statute by reason of his having used an interstate telephone to further his scheme. There is consequently no reason at all why guilt under the statute should hinge upon knowledge that interstate communication is used. If the wire employed is an interstate wire the requirements for federal jurisdiction are satisfied. It is wholly irrelevant to any purpose of the statute that the perpetrator * * * knows about the use of interstate communication.

2. Petitioners argue (Pet. 20-26) that their prosecution was the product of two episodes of allegedly illegal electronic surveillance and that the district court erred in refusing to permit them to inspect internal communications of the F.B.I. purportedly relevant to one such episode. These contentions, which were thoroughly considered and rejected by the district court and the court of appeals (Pet. App. A-15 to A-21), are insubstantial.

a. Petitioners' claim that the federal investigation and prosecution was tainted by electronic interceptions conducted by Colorado state authorities relates primarily to two reports that had been sent by the Denver police department to the Denver F.B.I. office in 1971 and 1972 (Def. Exs. G and H). These reports contained factual summaries of state cases filed against various individuals other than petitioners and affidavits referring to the so-called DeLuzio wiretap and to another state wiretap.[4]

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[4]The pertinent facts relating to these interceptions were summarized by the court below as follows (Pet. App. A-15 to A-17) (footnote omitted):

> * * * In February, 1971, the Denver police obtained a State Court order to intercept telephone conversations at the residence of one DeLuzio in Denver. During the wiretap, conversations

At an evidentiary hearing in the district court, Agent Paul Bush of the F.B.I. testified that the first report

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of defendants Smaldone and Villano were recorded. Villano's voice was also identified in a second State wiretap conducted in 1972.

At the hearing on the motion to suppress Sergeant Mulnix testified. Mulnix had been in charge of the State's wiretaps. He said that to his recollection, none of the tapes or transcripts of the recorded conversations were ever furnished to federal agents. He testified that on several occasions he had discussed Villano and Smaldone with [F.B.I.] agents Malone and Bush * * * and had informed them of the existence of the DeLuzio wiretap. He said that the discussions were of a general nature and that no FBI agent had ever requested the tapes or transcripts of the wiretap.

* * * [Agent] Malone said that he first became aware that Villano was involved in the investigation in March, 1971, when he learned through a confidential informant in Colorado that Villano was taking wagers at a certain location. The phone number at this location matched [a] phone number obtained [earlier] from the Nebraska FBI office.

It was also some time in March, 1971, that Sergeant Mulnix had informed Malone of the DeLuzio wiretap, saying: "We are picking up information that DeLuzio is involved with the Smaldones in bookmaking." (R III 135). However, Malone testified that he had known since 1968 that defendants Villano and Smaldone were involved in bookmaking activities. Malone also said that as a result of information from the Nebraska FBI and his Colorado informant, several persons were identified and called before a federal grand jury. Smaldone's involvement in the gambling activities in question here was discovered during testimony before the grand jury. Special Agent Bush testified to the same effect. He also said that he had talked with Sergeant Mulnix frequently. However, Bush's only inquiry concerning Villano was to ask Mulnix if there were any indication of interstate conversations on the DeLuzio wiretap, and Mulnix replied in the negative. Both Malone and Bush testified that they had never listened to the tapes nor read the transcripts of them (R III 140, 204). And they said that none of the witnesses or evidence for this case developed as a result of any information received through any wiretap or electronic surveillance (R III 182, 211).

of the surveillance had come into the F.B.I. office in April 1971 and that he had looked through the report, but that no investigation was made as a result of it. Agent William Malone testified that the DeLuzio report first came to his attention in May or June 1971, that he had read it, and that it had generally referred to conversations but did not contain the exact words that were used. Agent Malone further stated that in 1972 Sergeant Mulnix of the Denver police informed him that there had been another interception in which petitioner Villano's voice was overheard. Agent Malone read the second case summary concerning that interception but took no action as a result of receiving the report (Pet. App. A-17). Agent Malone also testified in detail that the investigation of petitioners had begun in February and March 1971 on the basis of information supplied by an F.B.I. agent in Nebraska and by a confidential informant in Colorado (Pet. App. A-16).

Assuming *arguendo* that the state interceptions were illegal,[5] petitioners' claim of taint was effectively rebutted by this testimony at the adversary hearing. The district court found "no indication that there was any or is any evidence that the government has obtained as a result of the electronic surveillance which was conducted by the Denver Police Department" (R III 241), and the court of appeals correctly upheld this conclusion as "amply supported" by the record (Pet. App. A-19). Petitioners have made no "obvious and exceptional showing of error" that would justify review of these factual determinations by this Court. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635.

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[5]Counsel for the government stated at the suppression hearing that these interceptions "would perhaps not pass federal muster" because they were not reported to the court (R II 120). See 18 U.S.C. 2518. Neither court below ruled on this issue, in light of their finding that no taint had been shown. Pet. App. A-18 to A-19 and n. 11.

b. Similarly unfounded is petitioners' contention that the district court erred in refusing to permit them to inspect internal F.B.I. communications allegedly relevant to their claim of taint.[6] Prior to trial, petitioners were furnished with transcripts of the intercepted conversations as well as with copies of the Denver police reports (Pet. 21). The F.B.I. interoffice communications at issue were submitted to the district judge for an *in camera* examination (R III 165-166). He concluded that the documents bore no indication of use by federal authorities of any improper source, in particular the electronic surveillance by Denver police (R III 237). The court of appeals also inspected the materials and reached the same result. Pet. App. A-20, n. 13.

Petitioners' reliance on *Alderman* v. *United States*, 394 U.S. 165, is misplaced. *Alderman* held that *surveillance records* as to which a defendant has standing to object should be furnished to him directly, since the task of determining relevance "is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court * * *" (394 U.S. at 182). The Court also stated, however (394 U.S. at 184), that

> disclosure will be limited to the transcripts of a defendant's own conversations and of those which took place on his premises.

Since petitioners were given the transcripts of the conversations in which they participated, the requirements of *Alderman* were satisfied. Indeed, the district court's and court of appeals' *in camera* examination of other documents provided petitioners with additional safeguards not mandated by *Alderman* or other decisions of this Court. See *Alderman* v. *United States*, *supra*, 394

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[6]Petitioners refer to these communications as "airtels." See Pet. 21; Pet. App. A-19, n. 12.

U.S. at 185; *Taglianetti* v. *United States*, 394 U.S. 316, 317.[7]

c. Petitioners' claims that certain electronic surveillance conducted in 1964 tainted the government's case and that the trial court erred in declining to convene a hearing to consider the matter are likewise without merit.

On the opening day of trial, the government reported that a complete check through federal agencies showed that in 1964 an Internal Revenue Service agent had monitored petitioner Villano's telephone calls and that another I.R.S. agent had interviewed Villano while wearing a recording device (R V 5-8). Petitioners contended that these acts were illegal and moved for a hearing to determine whether and to what extent the government's investigation had been tainted by them.

The district court's denial of petitioners' motion was correct. The extensive suppression hearing held one month earlier had established that the government's evidence had been developed entirely from an independent investigation begun in 1971, seven years after the I.R.S. activities, and had been initiated and pursued through leads provided by F.B.I. agents in Nebraska and by a confidential informant who was personally acquainted with petitioners' operation (R III 135). Thus, petitioners' allegations of taint were squarely contradicted by the

[7]The court of appeals' decision is not in conflict with *United States* v. *Huss*, 482 F. 2d 38 (C.A. 2), on which petitioners primarily rely (Pet. 23-24). In *Huss*, the tapes of the intercepted conversations were destroyed and no transcripts had been made. The court, relying on *Alderman*, concluded that the defendants should not have been required to depend upon the government's *summaries* of the intercepted conversations in order to demonstrate taint. 482 F. 2d at 50-51.

record.[8] As the court of appeals correctly observed (Pet. App. A-21):

> Agent Malone had previously testified he had no knowledge of any electronic surveillance of the defendants by federal agencies (R III, 164-65). There was no showing of a connection or similarity between Villano's 1964 operations and the 1971 conduct under prosecution. We must agree the request for the hearing was properly denied.

Finally, we note that the recordings of petitioner Villano's conversations with the I.R.S. agent did not violate the Fourth Amendment. *United States* v. *White*, 401 U.S. 745, 752-753. See also 18 U.S.C. 2511(2)(c).

3. Petitioners claim (Pet. 31-34) that the district court erred in admitting voice identification testimony by Amato, Colgan and Ferris without an adequate foundation. This contention is both factually and legally incorrect.

Amato testified at trial that he had relayed wagers for several weeks and that he had become familiar with the voice of the receiving party, which he was "99 percent sure" belonged to petitioner Smaldone (R V 147). Amato stated that he could identify her voice by specific characteristics, in particular its lower register (R V 147-148), and that the basis for his identification was two personal meetings that he had had with petitioner Smaldone

[8]For example, the letter disclosing the I.R.S. activities to the prosecutor, copies of which were made available to the court and defense counsel (R V 6), also stated that the pen register used to monitor petitioner Villano's telephone conversations in February 1964 had produced "no intelligible information" (R V 7). Similarly, petitioners' suggestion (Pet. 25) that Agent Malone might have developed information from the I.R.S. investigation is rebutted by Malone's testimony that while he knew from the early 1960's that petitioners were involved in bookmaking, he had learned these facts from personal "observation and interviews" (R III 141-142).

(R VI 258-259). At the second meeting, Smaldone had greeted him at the door of her home, had conversed with him briefly, and had then spoken with her husband in the next room (R VI 262-264).[9] This evidence clearly was sufficient to establish a foundation for Amato's identification testimony. See Rule 901(b)(5), Fed. R. Evid.; *United States* v. *Turner*, 423 F.2d 481, 484 (C.A. 7), certiorari denied, 398 U.S. 967; *United States* v. *Cox*, 449 F.2d 679, 690 (C.A. 10), certiorari denied, 406 U.S. 934. Any doubts about Amato's ability to identify accurately a voice that he had twice heard in person went to the weight, not the admissibility, of his testimony. See *United States* v. *Rizzo*, 492 F. 2d 443, 448 (C.A. 2), certiorari denied, 417 U.S. 944.

Petitioners' objection to the testimony of Colgan and Ferris is also unfounded, since neither witness identified petitioners at trial. Although Colgan testified that he relayed bets to a woman known to him as Pauline at a certain telephone number, other evidence connected that telephone number to petitioner Smaldone. See p. 3, *supra*. Colgan did not identify petitioner as the person with whom he spoke. Similarly, Ferris testified that he had a telephone conversation with a man called "Paulie" in which he was told not to worry about the F.B.I. because "they didn't know anything" (R V III-112). But Ferris never testified that "Paulie's" voice was that of petitioner Villano.

4. Petitioners contend (Pet. 26-29) that they were deprived of a fair trial because of prejudicial pre-trial publicity. About two months before trial, petitioners moved for a change of venue, alleging that there had been volu-

[9]Although Amato testified that he became extremely intoxicated during his first meeting with petitioner, he stated that he had not been drunk at the outset of the meeting (R VI 259-260).

minous prejudicial publicity that would make a fair trial impossible in Denver. The district court scheduled an evidentiary hearing on the motion, at which six persons affiliated with the local media were called by petitioners (R II 10-26; 64-83). The substance of the testimony of these witnesses was that there had been occasional newspaper reports or broadcast stories concerning either or both petitioners over the past several years. After considering this evidence together with two public opinion surveys that petitioners also had submitted (Def. Exs. C, E), the district court concluded (R III 238):

> [T]here is nothing that has been presented to me yet that shows this case could not be tried in this city and be tried by a jury who have not been subject to barrage or much publicity concerning the named defendants. This is always subject to change, of course. If it develops at the time the jury is being impaneled that we cannot get a jury composed of fair minded men and women who are not familiar with either of these individuals or for that matter the Smaldone surname or who have not formed any opinion in the case, why, if that develops at trial, then we will go no further in this city.

The court's determination that a fair and impartial jury could be selected was fully borne out by the *voir dire* examination. Each of the jurors and alternates eventually impaneled stated under oath during the extensive *voir dire* that he had neither heard nor read about the case and that he was not familiar in any way with petitioners' names (R V 55).[10] Additionally, each juror responded affirmatively when asked by the court if he could decide

[10]Of 85 prospective jurors questioned during *voir dire*, 17 (or 20 percent) had heard or read about the case and were excused. This hardly indicates "a community with sentiment so poisoned against petitioner[s] as to impeach the indifference of jurors who displayed

the case fairly and impartially (R V 58-59). Thus, the jury was fully qualified under the standard of *Irvin* v. *Dowd*, 366 U.S. 717, 722-723. See also *Murphy* v. *Florida*, 421 U.S. 794, 799-800.

This Court has consistently held that the defendant bears the burden of demonstrating that he has not received a fair trial. "[T]he burden of showing essential unfairness [must] be sustained by him who claims such injustice and seeks to have the result set aside, and [must] be sustained not as a matter of speculation but as a demonstrable reality." *United States ex rel. Darcy* v. *Handy*, 351 U.S. 454, 462, quoting *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 281. Petitioners have failed to meet their burden of showing that the trial judge abused his discretion in proceeding to trial once an impartial jury had been selected.

5. Finally, petitioners urge (Pet. 29-31) that their federal prosecution violated the Double Jeopardy Clause of the Fifth Amendment because they had already been prosecuted by the State of Colorado for gambling offenses that occurred near the end of the period covered by the federal indictment.[11] This claim is answered by the

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no animus of their own." *Murphy* v. *Florida*, 421 U.S. 794, 803. In *Murphy*, for example, 20 of 78 veniremen (or 25 percent) not only had heard about the case but had indicated an opinion of the defendant's guilt, and in *Beck* v. *Washington*, 369 U.S. 541, 556, the Court affirmed the conviction although 14 of 52 veniremen (or 27 percent) had expressed some bias. Compare *Irvin* v. *Dowd*, 366 U.S. 717, 727 (90 percent of prospective jurors entertained some opinion as to guilt). Moreover, mere knowledge about a case does not disqualify a juror and is not the equivalent of bias. See *Irvin* v. *Dowd*, *supra*, 366 U.S. at 722-723.

[11]Petitioners were convicted in state court of keeping a gambling room and gaming devices, gambling for a livelihood, and conspiracy (R IX 42-55).

Court's decisions in *Bartkus* v. *Illinois*, 359 U.S. 121, and *Abbate* v. *United States*, 359 U.S. 187, which held that prosecutions by both the federal and state governments do not constitute double jeopardy. Petitioners in effect urge the Court to overrule these decisions, a course that would seriously erode concepts of federal and state sovereignty that are the essence of our federal system.[12]

In any event, since petitioners were tried in state court for gambling offenses that obviously differed from the brokerage of interstate wagers for which they were prosecuted by the federal government, and which took place at a different period of time,[13] their federal trial would not have violated the Double Jeopardy Clause even if that clause did not allow successive state and federal prosecutions for the same offense.[14]

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[12]*Waller* v. *Florida*, 397 U.S. 387, upon which petitioners rely (Pet. 29-30), is an application of this principle, holding that municipalities (which are creatures of a State) are not separate sovereignties from the States for double jeopardy purposes.

[13]Two of the three federal counts concerned a time period prior to the occurrence of the acts prosecuted by the State, and the third count only partially overlapped.

[14]Indeed, because petitioners' federal prosecution did not involve substantially the same acts punished by the State, authorization from the Department of Justice was not required under Departmental practices.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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